

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

321

TRANSCRIPT OF RECORD

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1934

No. 6388

659

WATKINS-WHITNEY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

W. FRANK THYSON, JR., SMITH BOWMAN, JR.,
TRADING AS BOWMAN & THYSON, A PARTNER-
SHIP, AND JOHN H. SMITH.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

FILED JANUARY 4, 1935.

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United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1934

No. 6388

WATKINS-WHITNEY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

W. FRANK THYSON, JR., SMITH BOWMAN, JR.,
TRADING AS BOWMAN & THYSON, A PARTNER-
SHIP, AND JOHN H. SMITH, DEFENDANTS IN
ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 9, 1935.

United States Court of Appeals for the District of Columbia

No. 6388.

WATKINS-WHITNEY, a Corporation, Plaintiff in Error,

vs.

W. FRANK THYSON, JR., ET AL.

1 Municipal Court of the District of Columbia.

No. 293215.

WATKINS-WHITNEY, a Corporation, Plaintiff,

vs.

W. FRANK THYSON, JR., SMITH BOWMAN, JR., Trading as
BOWMAN & THYSON, a Partnership, and JOHN H. SMITH,
Defendants.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

2

Affidavit of Merit.

Filed July 11, 1934.

DISTRICT OF COLUMBIA, ss:

Harry M. Watkins, being first duly sworn, deposes and says that he is president of the Watkins-Whitney Company, the corporation named as plaintiff in this action, and has knowledge of the facts herein stated; that on or about

November 6, 1933, defendant John H. Smith came to plaintiff's place of business and offered to purchase certain paints and painters' supplies from plaintiff. Plaintiff asked Mr. Smith where the paints and supplies were to be used and he was informed that they were to be used on premises known as 1704-06 M Street, N. W., and 1152-54 17th Street, N. W., and that the defendants, W. Frank Thyson, Junior, and Smith Bowman, Junior, trading as Bowman & Thyson, were the general contractors on the said job and that the contract was for the sum of \$2,137.00. Plaintiff corporation, for reasons best known to itself, was not willing to grant credit to defendant Smith and so informed the partnership of Bowman and Thyson through Mr. Thyson. Then and there Mr. Thyson agreed that he would hold out 15% of moneys accruing to Mr. Smith and use the same to pay plaintiff for the paints and supplies when the job was completed in the event Mr. Smith had not already paid for them.

Relying upon the promise of defendant Thyson plaintiff sent the paints and supplies referred to in the particulars of demand attached hereto and made a part of the said addresses and they were used by defendant
3 Smith at those places. Sometime prior to the completion of said work one of the plaintiff's officers asked defendant Thyson if he was holding out from the money due Mr. Smith, the 15%, as promised and agreed. Mr. Thyson assured him such was being done. The balance due and owing from the defendants to the plaintiffs amounts to \$203.65, with interest thereon from the 4th day of December, 1933, until paid; that the plaintiff is entitled to judgment against the said defendants for the said sum of \$203.65 with costs of this suit, exclusive of all setoffs and just grounds of defense, according to the particulars of demand attached hereto.

(Signed)

HARRY M. WATKINS.

Subscribed and sworn to before me this 30th day of June, 1934.

(Signed)

MARY E. MICHAEL,
Notary Public.

Amended Particulars of Demand.

Filed August 13, 1934.

To paints, linseed oil, turpentine, brushes, scrapers, etc., furnished on the following dates to J. H. Smith, sub-contractor, at the request of W. Frank Thyson, Jr., and Smith Bowman, Jr., trading as Bowman & Thyson, a partnership, and for which the defendants agreed to pay by withholding 15% of the moneys due it by the owners of the building to be used to pay for these paints and the painting at 1704, 1706 and 1709 M Street, N. W., and 1150, 1152 and 1154 Seventeenth Street, N. W.

4

Date.	Debits.	Credits.	Date.	Debits.	Credits.
1933.			1933.		
Nov. 11....	\$20.78		Nov. 23....	\$21.25	
15....	9.45		23....	11.99	
15....	1.00		25....	10.18	
13....	17.84		28....	1.25	
28....		\$30.23	28....	10.95	
29....	1.50				
29....	26.22		Dec. 4....		\$20.00
22....	3.00		5....	21.42	
22....	8.60		7....	5.90	
20....	18.75		9....	12.85	
21....	1.20		6....	20.00	
16....	2.00		6....	8.45	
16....	1.40		1....	4.00	
24....	.30		4....	13.10	
			4....	.50	
Balance, \$203.65.					

(Signed)

CHARLES D. COUNCIL,
Attorney for Plaintiff.

Let this amended particulars of demand be filed.
August 13, 1934.

(Signed)

N. CAYTON,
Judge.

Motion to Dismiss.

Filed August 8, 1934.

Now come the defendants, W. Frank Thyson, Jr., and Smith Bowman, Jr., trading as Bowman & Thyson, a co-partnership, by their attorney, and move the Court to dismiss the Affidavit of Merit and Bill of Particulars filed in the above entitled cause of action on the ground that said Affidavit of Merit and Bill of Particulars do not set forth a cause of action.

(Signed) AUBREY ST. C. WARDWELL,
Attorney for Bowman & Thyson.

Order of Court on Motion to Dismiss.

October 16, 1934.

Mins. 85, p. 109:

Upon consideration of defendants' motion to dismiss this cause of action, it is ordered that said motion be, and the same is hereby overruled.

5

Affidavit of Defense.

Filed August 14, 1934.

W. Frank Thyson, Junior, being first duly sworn according to law, on oath deposes and says that he and Smith Bowman, Junior, defendants in the above-entitled cause, are co-partners, trading as Bowman & Thyson; that he is authorized to make this affidavit for and on behalf of said partnership; that he has personal knowledge of the matters and things hereinafter set forth; and for answer to the Affidavit of Merit and Amended Particulars of Demand filed herein states as follows:

He admits that the partnership of Bowman & Thyson was the general contractor for the construction and remodeling job, on premises 1704-06-08 M Street, Northwest, and 1150-52-54 17th Street, Northwest, in the District of Columbia, and that they sublet the painting contract to the defendant John H. Smith, for the sum mentioned in the said Affidavit of Merit.

He denies, however, that he agreed to withhold Fifteen Per Cent (15%) of monies accruing to the defendant Smith

and use the same to pay plaintiff for paints and supplies furnished Smith when the job was completed, in the event the said defendant Smith had not already paid for them; he further denies that sometime prior to the completion of said work he assured plaintiff's officers that Fifteen Per Cent (15%) of the monies accruing to the defendant Smith were being withheld to pay any claim of the plaintiff against Smith, and states the true facts to be that the paints and supplies referred to in the Particulars of Demand were ordered by the said defendant Smith, and delivered by the plaintiff to him, and that credit, if any, was extended to the said Smith, and not to Bowman and Thyson, nor upon any promise made by them.

6 Wherefore the said defendants Thyson and Bowman, individually and trading as Bowman & Thyson, deny that they are indebted to the plaintiff in the sum of Two Hundred Three Dollars and Sixty-five Cents (\$203.65), as alleged in said Affidavit of Merit and Amended Particulars of Demand, or for any other sum whatsoever, and pray this Court that the suit of the plaintiff against them be dismissed.

(Signed)

W. FRANK THYSON, JR.

Subscribed and sworn to before me this 14th day of August, 1934.

(Signed)

HELEN R. SASSCER,

Notary Public.

(Signed) AUBREY ST. C. WARDWELL,

Attorney for Defendants Bowman & Thyson.

Finding and Judgment.

September 12, 1934.

Mins. 83, p. 273:

Comes now the plaintiff and the defendants, W. Frank Thyson, Jr., and Smith Bowman, Jr., trading as Bowman and Thyson, and this cause being heard and submitted, the Court finds in favor of the said defendants.

Motion for New Trial.

Filed September 15, 1934.

Comes now the plaintiff, the Watkins-Whitney Company, a corporation, by its attorney, Charles D. Council, and

moves the court to vacate and set aside the judgment rendered herein by this court on, to wit, the 12th day of September, 1934, and to grant a new trial of said cause.

7 And for grounds for this motion plaintiff says as follows:

1. That defendants, through their attorney, made and argued a motion to dismiss plaintiff's action on the ground that the pleadings did not state a cause of action and in support of this motion defendants' attorney argued only that the statute of frauds applied and on plaintiff's pleadings it could not recover, and no other question or point was before the court on this motion.

Judge Cayton overruled the motion.

After motion was overruled defendants filed an affidavit of defense, but as the court had ruled on the question of law which was and is controlling in the case there is nothing in this affidavit about that question as a defense. When the case was called for trial attorney for plaintiff asked defendants' attorney to take the case back to Judge Cayton (Judge Cayton was not trying a case) and the defendants' attorney refused.

2. The court committed prejudicial error in the trial of this cause when it stated while plaintiff's first witness had testified briefly showing the nature of the case that the case was plainly within the statute of frauds in that it was a promise not in writing to pay the debt of another and that it was useless for plaintiff to proceed with its testimony.

Attorney for plaintiff asked the court to take in account that Judge Cayton had decided this question exactly the other way, but the trial judge, after being so advised, decided the case, and then went through the trial in form and rendered a decision for defendants.

8 The trial judge, after so deciding the case, took all the testimony in it, which was a waste of time, and by taking this testimony made a situation in which it may be difficult to obtain a writ of error as the opposing side will have a right to contend that there is no way to determine whether or not the case was decided on the law or the facts, or both, and so it is plaintiff has lost in trial court, and has been disadvantaged by error of the trial judge to have writ of error granted and the case reversed by a higher court.

3. That said finding is contrary to the evidence.
4. That the said finding is contrary to the weight of evidence.
5. That said finding is contrary to law.

(Signed)

CHARLES D. COUNCIL,
Attorney for Plaintiff.

Aubrey St. C. Wardwell, Esquire,
Attorney for Defendants,
Woodward Building,
Washington, D. C.

Please take notice that the motion for new trial in the above entitled cause is calendared for hearing on Wednesday, September 19, 1934, at 10:00 A. M., or as soon thereafter as counsel may be heard.

(Signed)

CHARLES D. COUNCIL,
Attorney for Plaintiff.

Service of copy of above entitled motion acknowledged on this 15th day of September, 1934.

(Signed)

HELEN E. CURTIN,
*For Aubrey St. C. Wardwell,
Attorney for Defendants.*

9 *Order of Court on Motion for New Trial.*

September 19, 1934.

Mins. 83, p. 283:

Come now the parties hereto, by their attorneys of record, and upon consideration of plaintiff's motion for a new trial, it is ordered that said motion be, and the same is hereby, overruled. Wherefore it is considered that the plaintiff take nothing by this action of the defendants, W. Frank Thyson, Jr., and Smith Bowman, Jr., trading as Bowman and Thyson; that said defendants go hence without day, be for nothing held and recover of plaintiff their cost of defense.

10 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable George C. Aukam, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said

Municipal Court, before you, between Watkins-Whitney, a corporation, plaintiff, and W. Frank Thyson, Junior, Smith Bowman, Junior, trading as Bowman & Thyson, a partnership, and John H. Smith, defendants, 293,215, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Court of Appeals for the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 9th day of October, in the year of our Lord one thousand nine hundred and thirty-four.

[Seal United States Court of Appeals for the District of Columbia.]

HENRY W. HODGES,
*Clerk of the United States Court of
Appeals for the District of Columbia,*
By MONCURE BURKE,
Deputy Clerk.

Allowed by

D. LAWRENCE GRONER,

*Associate Justice of the United States Court of
Appeals for the District of Columbia.*

[Endorsed:] Filed Oct. 9, 1934, Municipal Court, District of Columbia.

11

Assignment of Errors.

Filed October 16, 1934.

The plaintiff, Watkins-Whitney Company, a corporation, is advised and so states for assignment of error as follows:

(1) That the court erred in holding that the defendants, W. Frank Thyson and Smith Bowman, Junior, trading as Bowman and Thyson, a partnership, were not liable for the purchase price of the paints and paint supplies furnished to John H. Smith, subcontractor.

(2) That the judgment entered therein is contrary to law.

(Signed)

CHARLES D. COUNCIL,
Attorney for Plaintiff.

Received a copy of the foregoing on this 16th day of October, 1934.

(Signed)

AUBREY ST. C. WARDWELL,
Attorney for Defendant.

12 In the Municipal Court of the District of Columbia.

Law. No. 293-215.

WATKINS-WHITNEY COMPANY, a Corporation, Plaintiff,

vs.

W. FRANK THYSON, JUNIOR, and SMITH BOWMAN, JUNIOR,
Trading as BOWMAN & THYSON, a Partnership, JOHN H.
SMITH, Defendants.

Bill of Exceptions.

Be it remembered, that at the trial of this case, before Judge George C. Aukam, **Jerome L. Michael**, credit manager, testified on plaintiff's behalf on direct and cross-examination, in substance as follows:

Plaintiff is a dealer in paints and in November, 1933, John H. Smith requested plaintiff to furnish paints for a job he had contracted to do for Bowman & Thyson, general contractors. Plaintiff's credit manager refused to grant credit to Smith because he admitted he owed nine or ten accounts around town and had some unpaid judgments against him. Witness was advised by Smith that his con-

tract with Bowman & Thyson authorized them to hold back 15 per cent of money due him on the contract price for the work and suggested that plaintiff get in touch with Bowman & Thyson and they would verify this. Witness called Bowman & Thyson by telephone and advised them that his firm would not grant Smith credit unless assured that plaintiff would be paid for the paints out of this 15 per cent.

Witness further testified that Thyson assured him the defendants had a right to hold out the 15 per cent and Thyson agreed to pay plaintiff out of said percentage belonging to Smith, if Smith did not pay it. Delivery of the materials was begun and two or three weeks later Smith gave plaintiff a bad check and witness again com-
13 municated with defendants and advised them of this and refused to furnish more materials unless defendants would agree to see plaintiff paid out of this 15 per cent if Smith did not pay.

Both Bowman and Thyson came to plaintiff's store and Bowman informed witness that enough money was being held out to pay Smith's debt if he did not and on that assurance deliveries were continued.

Clifford M. Stretmater testified on plaintiff's behalf on direct and cross-examination, in substance, as follows:

He was present when Bowman and Thyson came to plaintiff's store and heard Bowman (whom he had never seen before but recognized at the trial) tell Michael, the credit manager, to continue deliveries of the materials as the defendants did not want the job held up and that they had enough of Smith's money in their possession to take care of the debt if Smith did not.

Robert S. Burwell testified on plaintiff's behalf on direct and cross-examination, in substance, as follows:

That he was employed by plaintiff as an outside salesman and secured Smith's order for the paints. He was sent by Michael to talk with defendants on the job about paying for the paint and talked with Thyson who promised to take care of the bill. He further testified that this conversation occurred about March, 1934.

John H. Smith, one of the defendants herein, and the subcontractor, testified on behalf of plaintiff, on direct and cross-examination, in substance, as follows:

He was the subcontractor on the job for Bowman and Thyson, codefendants, and in November, 1933, after he had the contract for the work at Seventeenth and M Streets Northwest, for Bowman & Thyson, he approached plaintiff and asked that paints and other materials be delivered on the job on credit. Plaintiff declined to grant the credit but when he informed Michael of the clause in his contract permitting Bowman & Thyson to hold out 15 per cent of the moneys accruing to him, the credit manager
14 promised to get in touch with Bowman & Thyson and let Smith know his decision later.

That two or three days later Thyson saw him on the job and informed him arrangements had been made so he could get the materials on credit.

Smith testified further that the materials as set forth in plaintiff's amended particulars of demand were delivered and used on the job as alleged and were worth the prices charged for them in this case.

That Bowman & Thyson had paid him \$1,905 on account of the contract price of \$2,237 due him under the contract. At this point plaintiff's attorney started to have Smith identify his contract with Bowman & Thyson and defendants' counsel agreed to offer in evidence his client's contract and plaintiff's counsel agreed to that.

A copy of that contract is as follows:

Century Engineering Company, Incorporated.

Contractors,

2623 Third Street, N. W.

Washington, D. C.

Decatur 3178.

J. H. Smith, President.

J. T. Funkhouser, Secretary.

Concreting, Remodeling, Ventilating, Painting, Papering,
Wiring.

Nov. 6, 1933.

Bowman & Thyson,

1115 Conn. Avenue, N. W.,

Washington, D. C.

GENTLEMEN:

We hereby purpose to furnish all labor and material necessary to complete the following work on the six houses

at 1150, 1152, & 1154 17th St. and 1704, 1706, & 1708 M Street, N. W., Washington, D. C.

Electric Wiring: Install electric wiring complete with 1 light, 1 switch and 1 plug in each room with 3-way sets in halls. Basements to have switch at head of stairs on main lt. and 1 light in each room with plugs and switches in living quarters. Light fixtures to be submitted for approval. No light bulbs are included. Street services to be paid for by others.

Plastering: Repair and replace all broken or loose plaster to leave ready for papering or painting.

15 Papering: Paper the entire houses except kitchens, baths and basements. Selection of papers to be made by owners, from samples. All old paper to be scraped from walls and ceilings and plaster repaired and all new plaster sized.

Painting: Paint all kitchens and baths 2 coats semilustre paint and all woodwork that is now painted to be painted 2 coats. Basements to be done in cold water paint and pipes to be painted 1 coat black. Natural woodwork to be 2 coats semilustre paint. Floors to be cleaned and 1 coat varnish or shellac. All outside trim, steps and metal to have 2 coats lead & oil paint. Roofs to have 2 coats red metallic. All rough places to be scraped and prepared so as to make a good finished job. Burn where necessary on front woodwork.

All of the above for the sum of twenty two hundred thirty seven and no/100 dollars (\$2,237.00).

Terms: Payments to be made each Friday for 85% of the value of the work completed through Thursday. Schedule to be filed as basis of payments.

All work to be executed in a prompt and workmanlike manner.

Yours very truly,

CENTURY ENGINEERING COMPANY,

By (S.) J. H. SMITH.

Accepted Nov. 6, 1933.

BOWMAN & THYSON,

By (S.) W. F. THYSON, JR.

Plaintiff rested.

Thereupon, **W. Frank Thyson, Jr.**, one of the defendants, testified on behalf of defendants, in substance as follows:

That at the time in question he received a telephone call from plaintiff's credit manager who stated that Smith had made application with his firm for credit and he desired to know the terms and conditions of Smith's contract with the defendants. He testified he informed the credit manager that Smith had a subcontract with them to complete the electric wiring, plastering, papering and painting work at the premises, the amount of the contract price and that they, Bowman & Thyson, were withholding Fifteen per cent of the contract amount for the faithful performance of Smith's contract. He denied making the statement as claimed by Mr. Michael that he promised him he would see the plaintiff paid out of any funds that might accrue to Smith and denied that at this time he had any conversation with Mr. Michael concerning the payment of Smith's account in the event he, Smith, did not pay it.

The witness also denied that at the time Smith's
16 check was returned to plaintiff he promised Mr.

Michael the defendants would see plaintiff paid out of any funds that might accrue to Smith. The witness' testimony on this point was that Mr. Michael telephoned him stating that Smith's check had been returned because of insufficient funds and wanted to know what the defendants could do about it; that he told Mr. Michael it was none of their business as they had paid Smith regularly each week according to the terms of his contract and that he would have to take the matter up with Smith.

The witness further testified that during the first part of December, 1933, Smith defaulted in his contract and it became necessary for the defendants to take over and complete the work. At this time he and Mr. Bowman went to the plaintiff's store and informed Mr. Michael that Smith had defaulted and it was necessary for them to complete the work; that they would be glad to open an account and purchase from the plaintiff the necessary materials to do the work; that Mr. Michael at this time asked him what chance the plaintiff had of obtaining payment of the bill owed by Smith for the purchase of materials used on the job and that he informed Mr. Michael the defendants had withheld Fifteen per cent of the contract price and if after completing the job there was anything due Smith, he would advise the plaintiff accordingly and not pay it to Smith. The witness further testified that it cost the defendants approximately \$200.00 over and above the contract price

to complete Smith's work and as a result there was not money that accrued to Smith's benefit. He further testified that the defendant's bill with the plaintiff was approximately \$126.00 and was paid in full a few days after they had completed the work. He also testified there were claimants other than the plaintiff as creditors of Smith arising out of his contract of this job.

This is the substance of all testimony, and the Court found for the defendants. Plaintiff thereafter filed a motion for a new trial, which upon argument was over-
17 ruled and judgment entered for the defendant.

Thereupon, plaintiff noted an exception and caused note to be made of its intention to apply for a writ of error at the time thereof.

And thereupon, and as all said exceptions were duly noted and allowed as aforesaid and duly entered upon the minutes of the Court, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the petitioner may have its case reviewed on appeal, the petitioner by his attorney, moves the Court to sign and seal this, his bill of exceptions, to have the same force and effect as if each and every one of said exception — been separately signed and sealed, which motion is granted by the Court; and thereupon the petitioner tenders this, his Bill of Exceptions, and requests the Court to sign and seal the same, which is accordingly done, now for then, this the 16th day of October, 1934.

GEORGE C. AUKAM,
Judge.

Approved:

CHARLES D. COUNCIL,
Attorney for Plaintiff.

AUBREY ST. C. WARDWELL,
Attorney for Defendant.

Signed Dec. 14, 1934.

18 [Endorsed:] No. 293,215. Watkins-Whitney Co.,
a Corporation, vs. W. Frank Thyson, et al. Bill of
Exceptions.

19

Designation of Record.

Filed October 16, 1934.

The plaintiff having been granted a writ of error by the United States Court of Appeals for the District of Columbia on the 9th day of October, 1934, hereby request the clerk of the Municipal Court of the District of Columbia, to prepare, at plaintiff's expense, a transcript of the record on appeal, including therein the following papers and proceedings, viz:

1. Affidavit of Merit.
2. Amended Particulars of Demand.
3. Motion to Dismiss.
4. Order of Court on Motion to Dismiss.
5. Affidavit of Defense.
6. Finding and Judgment.
7. Motion for New Trial.
8. Order of Court on Motion for New Trial.
9. Writ of Error.
10. Assignment of Errors.
11. Bill of Exceptions, together with a copy of this designation.

(Signed)

CHARLES D. COUNCIL,
Attorney for Plaintiff.

Received a copy of the above designation of record, this the 16th day of October, 1934.

(Signed)

AUBREY ST. C. WARDWELL,
Attorney for Defendants.

20 Municipal Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I. Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 19, both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in Cause, At Law, No. 293215, wherein Watkins-Whitney, a Corporation, is plaintiff, and W. Frank Thyson, Jr., Smith Bowman, Jr., trading as Bowman and Thyson, a partner-

ship, and John H. Smith, are defendants, as the same that remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Court, at the City of Washington, in said District, this 4th day of January, 1935.

[Seal Municipal Court, District of Columbia.]

BLANCHE NEFF,
Clerk.

Endorsed on cover: In Error to the Municipal Court of the District of Columbia. No. 6388. Watkins-Whitney, a Corporation, Plaintiff in Error, vs. W. Frank Thyson, Jr., et al. United States Court of Appeals for the District of Columbia. Filed Jan. 4, 1935. Henry W. Hodges, Clerk.

(5832-C)

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED FEB 27 1935

Henry H. Hodges

United States Court of Appeals
for the District of Columbia

OCTOBER TERM, 1934

No. 6388

WATKINS-WHITNEY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

W. FRANK THYSON, JR., SMITH BOWMAN, JR.,
TRADING AS BOWMAN & THYSON, A PARTNER-
SHIP, AND JOHN H. SMITH.

BRIEF FOR PLAINTIFF IN ERROR

CHARLES D. COUNCIL, *Attorney.*

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1934

No. 6388

WATKINS-WHITNEY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

W. FRANK THYSON, JR., SMITH BOWMAN, JR.,
TRADING AS BOWMAN & THYSON, A PARTNER-
SHIP, AND JOHN H. SMITH.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This case comes to this court from the Municipal Court on writ of error.

Plaintiff, in error, a corporation, filed suit against Bowman and Thyson, partners, general contractors, and John H. Smith, their paint sub-contractor, for \$203.65, balance due for paints bought from plaintiff by Smith for this contract.

Plaintiff in error will in this brief be called plaintiff, and Bowman & Thyson will be called defendant partners, defendant Smith will be called Smith.

Smith requested plaintiff to sell him on credit paints to be used on said contract and plaintiff refused to grant Smith credit because he owed nine or ten accounts around town and had some unpaid judgments against him. (Rec. 9.)

Thereupon Smith told plaintiff that his contract with defendant partners provided they might retain 15% of the contract price of the job. (Rec. 9, 10, 11, 12, 13.)

Plaintiff contacted defendant partners and advised them it would not grant credit to Smith, and Thyson told plaintiff that if it would sell Smith on credit the paints he needed on the job they would hold enough of the 15% belonging to Smith to pay plaintiff, if Smith did not pay. (Rec. 2, 3, 9, 10, 11.)

Defendant Thyson saw Smith on the job and told him credit arrangements had been made and goods were delivered. (Rec. 11.)

During the progress of the work Smith gave plaintiff a bad check, and plaintiff contacted defendant partners and advised them no more paints would be furnished unless defendants would confirm their agreement to see plaintiff paid out of his 15%, if defendant Smith did not pay. (Rec. 10.)

Defendant partners then came to store of plaintiff's and assured it enough money was being retained to pay Smith's debt if he did not, and asked plaintiff to continue deliveries as they did not want the job held up. (Rec. 10.)

When this action was brought defendant partners had paid defendant Smith \$1,905 on the contract price \$2,237. (Rec. 3.)

The contract provides for retaining 15% and Thyson's testimony shows Smith was paid in accord with the terms of the contract. (Rec., 12, 13.)

Defendant partners moved for dismissal of affidavit of merit and particulars of demand on the sole ground that they—

“do not set forth a cause of action.” (Rec. 4.)

Argument on the motion was solely on the ground that the action was based on a promise by defendant partners to pay the debt of Smith without their promise in writing. (Rec. 6.)

The motion to dismiss, in effect, a general demurrer, admits the allegations in affidavit of merit and particulars of demand, and the only ground of their motion was that the two did not state a cause of action.

In his argument attorney for defendant partners contended that the only question involved was a single law point of the statute of frauds, holding one person to pay the debt of another without a promise in writing.

Judge Cayton overruled the motion to dismiss and the defendant partners changed front and filed an affidavit of defense which does not mention the statute of frauds. At the trial of the case only one of defendants' witnesses testified, and now defendant partners contend that the case involves a question of law and a question of fact, but it is respectfully submitted that the defendant partners should not be allowed to prevail by this obvious subterfuge.

In their objection to granting the writ of error in this case defendant partners swore that the case involved only this question of law, and that corroborates the position they took in making the motion to strike. They should not be allowed to lightly disregard their first position established by this oath of one of the partners.

District of Columbia vs. Selden, 62 W. L. R. 102.

When the case was called for trial Judge Aukam directed the trial to proceed and a witness for plaintiff was called, and sworn, and after a few preliminary questions which showed the nature of the case, Judge Aukam stopped him and said there was no reason to proceed with testimony because the case was plainly a question of law—a promise to pay the debt of another without a paper writing—and within the statute of frauds. (Rec. 6.)

Thereupon attorney for plaintiff asked Judge Aukam to consider that Judge Cayton had decided this law question in favor of plaintiff but Judge Aukam decided this point against plaintiff.

After thus deciding the case for defendant partners solely on a point of law Judge Aukam went through with the form of a trial which furnishes attorney for defendant partners a right to contend the case was decided on the evidence instead of the law, or both, in which event it might prevent reversal. (Rec. 6.)

There is nothing in the case to show that there has been any decision as to Defendant Smith, and the language of the finding limits it to the two defendant partners (Rec. 5) and the language of the judgment is the same. (Rec. 7.)

Thus it appears final judgment has been entered in the case without any determination of the claim of plaintiff against defendant Smith and without anything of record for Smith or against him and the action of plaintiff as against him is up in the air, and if it be true that only one final judgment may be entered in a law suit then defendant Smith who made no defense against the claim plaintiff asserted against him, and was not represented by attorney in the case, and only took part as a witness, and who admittedly owes plaintiff the entire sum claimed as shown by

affidavit of merit and particulars of demand, is exonerated from any liability by reason of the state of the record in this suit.

And if plaintiff should bring another suit against Smith to collect this amount he may successfully defend on the ground of pending suit between the same parties for the same cause of action in the same court and in which there is no disposition as to Smith, although the case has been tried and final judgment entered.

Plaintiff was, and is entitled to have a judgment against Smith for the debt as claimed, but unless this court reverses the lower court in this case, the plaintiff is deprived of such judgment and because of pending action between the same parties in the same court as to same subject matter, plaintiff is prevented from maintaining any other suit against Smith to collect this debt, as there is no other court in which plaintiff may sue Smith.

ASSIGNMENT OF ERROR

(1) That the court erred in holding that the defendants, W. Frank Thyson and Smith Bowman, Jr., trading as Bowman & Thyson, a partnership, were not liable for the purchase price of the paints and paint supplies furnished to John H. Smith, subcontractor.

(2) That the judgment entered therein is contrary to the law.

ARGUMENT

Attorneys for both sides considered the case presented only a question of law under the statute of frauds, holding one person to pay the debt of another without a promise in writing and Judge Cayton and Judge Aukam so considered it. (Rec. 6.)

Attorney for defendant partners filed in this court
“OBJECTIONS TO ALLOWANCE OF WRIT OF
ERROR”

and at the bottom of page 1 and top of page 2 of said objections, which are signed by attorney for defendant partners and signed and sworn to by Defendant Thyson, appears the following:

“The court heard the evidence and decided the case. It found as follows:

“1st. That the claim of the plaintiff against these respondents, in the amount of \$203.65, was to charge them to answer for the debt or default of another and as such came within the statute of frauds, as set forth in the code of laws for the District of Columbia, page 117, title 11, chapter 1, section 2, and should have been in writing if respondents were to be charged with the claim.

“2nd. That at completion of the contract involved there were no funds due to the defendant, John H. Smith, Subcontractor, as he had defaulted in his contract with respondents, Bowman & Thyson, and they were required to take over and complete Smith's contract at a loss to themselves.”

Contention of plaintiff is that this case was decided by the court below on a question of law, but for the sake of argument we review the situation.

When Smith signed his contract with defendant partners, he had no money to pay cash for his materials and asked credit of plaintiff and plaintiff finds his credit record is not good. (Rec. 9.)

Smith refers to his contract for \$2,237 with defendant partners and the 15% clause and then plaintiff contacts defendant partners and tells Thyson that he will not grant Smith credit but will deliver the materials provided de-

defendant partners will see him paid out of the retained percentage.

Defendant partners have a contract to renovate six buildings (Rec. 2, 3, 11, 12) and if Smith fails to perform his contract the whole job will be delayed and impeded and in these circumstances Thyson promised he would see plaintiff paid. (Rec. 2, 3, 9, 12, 13.) At the time of the bad check incident if defendants had not confirmed that promise no more paints or supplies would have been delivered.

Deliveries continued for the one reason that defendant partners said at the beginning they would pay and later they did not want the job held up and they confirmed the promise to pay and said they had enough money to pay if Smith did not. (Rec. 2, 3, 9, 10, 11, 12, 13.)

The net result of all this testimony shows plainly that defendant partners made an original promise and not a collateral promise to pay for the paints.

And in this connection it may be noted that the only witness for all the defendants was Thyson, one of the defendant partners, and his testimony is contradicted by the four witnesses for plaintiff. (Rec. 9, 10, 11, 12, 13, 14.)

After Thyson had finished his testimony Judge Aukam said it was not necessary to offer the testimony of the other defense witnesses present, and this shows plainly that Judge Aukam still had the fixed opinion that only a question of law was involved. (Rec. 6.)

Statute of frauds does not apply when—

1. When the promisor has a personal or pecuniary interest in the transaction and promises to pay.

2. When the promisor has possession of funds or property of the debtor with which to pay the debt, or where such funds later come to his possession, and he promises to pay out of such property or funds.

In the case of *Davis vs. Patrick*, 141 U. S. 479, Patrick contracted to deliver ore to the Flagstaff mine. He delivered part of the ore and was not paid in accordance with his contract. Later he was introduced to Davis, a creditor and stockholder of the mining company. Patrick informed Davis that he was not getting his money. Davis told Patrick he would see that he got every dollar of his money; to continue delivering the ore and he would see him paid. Plaintiff received enough money to pay him for what had been delivered up to the time of Davis' promise. Action was brought for the debt which accrued after the promise of Davis.

The evidence disclosed that Davis was a large stockholder in the mining company. In fact he stated that he was practically the owner of the mine. This fact was unknown to Patrick at the time he contracted to haul the ore. The court said at page 489:

“His (Davis') promise was not one purely collateral to sustain the obligations of the mining company, but substantially a direct and personal one to advance his own interest. While the mining company was ultimately to be benefited, Davis was primarily to be benefited by the transportation of the ore, for thereby that debt which otherwise could not, would be paid to him. He therefore, in any true sense of the term, occupied not the situation of a collateral undertaker, but that of an original promiser and it would be a shadow on justice if the administration of the law relieved him from the burden of his promise on the ground that it also resulted to the benefit of the mining company, his debtor.”

Emerson vs. Slater, 22 Howard 28, 16 L. Ed. 360;
Larsen vs. Jensen, 53 Mich 427;
Crawford vs. Edison, 45 Ohio St. 239.

In Cincinnati Traction Co. vs. Cole et al., 258 Fed. 169, are collated and discussed numerous references to court decisions on the question involved. In many respects the facts in that case are analogous to the case before this court. Briefly stated the facts of that case are these:

The H. Co. had nearly completed a contract with defendant by which it was to do certain work on its premises for \$15,560, of which \$9,548 had been paid, on monthly estimates, to an assignee of H. Co. and possibly as much as \$2,000 more had been earned, the larger part of which was *retained percentage*. H. Co. was indebted to plaintiffs in the sum of \$2,500 for lumber used in the work and plaintiffs had a right to a lien on defendant traction company's premises therefor, which would be unaffected by the assignment or payments thereunder. Defendant traction company, by its contract, had the right to retain out of subsequent payments an amount sufficient to indemnify it against this lien, and, in case of deficiency, had recourse against the H. Co. and a surety to make it good.

Plaintiff Cole's evidence tended to show that the making of the promise came about by his refusal to deliver more lumber needed to complete the contract, that the promise was made by the traction company in consideration of its promise to continue deliveries of lumber and not to take out a lien, and that it was to pay plaintiffs, at least conditionally (i. e., if the H. Co. did not) for the lumber previously delivered and that thereafter delivered. Thereafter plaintiff Cole delivered lumber of the value of \$524 making the whole amount due them \$3,474, for the recovery of which action was brought.

At page 173 the court says:

“The authorities are numerous to the effect that a promise to answer for the debt of third person out

of such person's funds in the promisor's hands, is not within the statute."

In the event this court should by any chance consider this case as decided on the evidence offered at the trial by the litigants it is respectfully submitted that special attention should be given to what the court says at page 174:

"The interest prompting a legislature to protect from perjury is not the same in the case of one who has a personal concern in the debt as in that of one who has no such concern. Where the making of the promise is not dependent solely on the testimony of witnesses, the fact of having such concern is corroborating circumstances in support of testimony tending to show the making of the promise. It renders it more likely."

At page 179 the court says further:

"* * * The defendant had a personal concern in the creation of so much of the debt as was created after the making of the promise, and in so much thereof as had been theretofore created. It had such concern in the creation of the former portion it would result from plaintiff's continuing to deliver lumber, and thereby the completion of the work which Heffron Company had contracted to do would be furthered. It had such concern in the payment of the latter portion for thereby its property would be relieved of the lien which plaintiff had a right to take out. Such being the case, the defendant's promise, whatever may have been its character, was not within the statute.

"But this was not the only ground upon which it can be said that the promise was not within the statute. To say the least, it was open for the jury to find that the promise was to answer for the debt, not out of its own estate, but out of the Heffron Co.'s funds.
* * *"

25 R. C. L. 504, section 87.

27 C. J. 137, section 23, subsection 3.

Defendant Thyson testified that Smith defaulted on the job and that the retained percentage was used to make the default good but the contract does not give defendant partners any right to use this 15% for that purpose (Rec. 13) and it is respectfully submitted that default of Smith, if there were default, has nothing to do with the case. That occurred long after defendant partners had made their promise to pay for the paints out of the percentage and when defendants made the promise and later confirmed it they parted with any right as to what was due plaintiff out of this 15% and defendants had no right to use the 15% for any other purpose than as so promised. The terms of the contract do not give defendant partners any right to determine what shall be done with that 15%. That belonged to Smith. If their contention is right—to use the 15% as they claim it was used—then they might properly try to assert that claim in suit or counterclaim in this suit, but they can not rightfully take the law into their own hands and determine as testimony of Thyson shows they did.

In conclusion it is respectfully submitted that the motion to dismiss and Judge Cayton's ruling thereon, the attitude of Judge Aukam, the sworn "Objections to Granting of the Writ of Error" and the evidence all show that there is only a question of law involved in this case.

This particular question of law has never been decided by this court.

We ask that the judgment of the court below for defendant partners be reversed.

Respectfully submitted,

CHARLES D. COUNCIL,
Attorney for plaintiff in error.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED APR 1 - 1935

Henry W. Hodges

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1934.

No. 6388.

WATKINS-WHITNEY, A CORPORATION,
Plaintiff in Error,

vs.

W. FRANK THYSON, JR., AND SMITH BOWMAN, JR., TRAD-
ING AS BOWMAN & THYSON, A PARTNERSHIP,
AND JOHN H. SMITH,
Defendants in Error.

**BRIEF FOR DEFENDANTS IN ERROR, W. FRANK
THYSON, JR., AND SMITH BOWMAN, JR.,
TRADING AS BOWMAN & THYSON, A PART-
NERSHIP.**

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Smith Bowman, Jr., trading
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1.

SUPPLEMENTAL STATEMENT OF FACTS.

The testimony discloses that plaintiff in error filed suit against Bowman & Thyson, General Contractors, and John H. Smith, their subcontractor, for \$203.65 balance claimed to be due for paints purchased from it by Smith. The record discloses (R. 11-12) that by con-

tract dated November 6th, 1933, Bowman & Thyson subcontracted to Smith the electric wiring, plastering, papering and painting on the premises described therein for the sum of \$2,237.00. The contract provided (R. 12) that payments were to be made to Smith each Friday for 85 per cent of the value of the work to be completed through Thursday. W. Frank Thyson, Jr., one of the defendant partners, testified (R. 13) that 15 per cent of the amount of the contract was withheld for the faithful performance of Smith's contract.

Smith testified (R. 11) that when plaintiff declined to grant him credit he informed Michael (Plaintiff's Credit Manager) of the clause in his contract permitting Bowman & Thyson to withhold 15 per cent of the moneys accruing to him and that Michael promised to get in touch with Bowman & Thyson and let Smith know his decision later. Michael thereupon testified that he communicated with Thyson by telephone and was assured by him that the defendant partners had a right to withhold 15 per cent and agreed to pay plaintiff out of said percentage belonging to Smith, if Smith did not pay it (R. 10). Tyson testified (R. 13) that at the time in question he received a telephone call from plaintiff's credit manager who stated Smith had made application with his firm for credit and he desired to know the terms and conditions of Smith's contract with defendant partners. He further testified he informed the credit manager (R. 13) that Smith had a contract with them for the electric wiring, plastering, papering and painting and that they had a right to withhold 15 per cent of the contract price. He denied making the statement as claimed by Mr. Michael that he promised him he would see plaintiff paid out of any funds that might accrue to Smith and also denied he had any con-

versation with him concerning payment of Smith's account, in the event he, Smith, did not pay it. The witness likewise denied that at the time Smith's check to plaintiff was dishonored, said plaintiff refused to furnish more materials unless defendant partners would agree to see plaintiff paid out of the 15 per cent being withheld, if Smith did not pay it. The witness's testimony on this point was that Michael telephoned him stating Smith's check had been dishonored and wanted to know what Defendant Partners could do about it and that he told him they paid Smith regularly each week according to the terms of the contract and he (Michael) would have to take the matter up with Smith (R. 13).

The witness further testified that during the first part of December, 1933, Smith defaulted in his contract and it became necessary for the Defendant Partners to take over and complete the work. At this time he and Mr. Bowman went to the plaintiff's store and informed Mr. Michael that Smith had defaulted and it was necessary for them to complete the work; that they would be glad to open an account and purchase from the plaintiff the necessary materials to do the work; that Mr. Michael at this time asked him what chance the plaintiff had of obtaining payment of the bill owed by Smith for the purchase of materials used on the job and that he informed Mr. Michael the Defendant Partners had withheld 15 per cent of the contract price and if after completing the job there was anything due Smith, he would advise the plaintiff accordingly and not pay it to Smith. The witness further testified that it cost the Defendant Partners approximately \$200.00 over and above the contract price to complete Smith's work and as a result there was no money that accrued

to Smith's benefit. He further testified that the Defendant Partners' bill with the plaintiff was approximately \$126.00 and was paid in full a few days after they had completed the work. He also testified there were claimants other than the plaintiff as creditors of Smith arising out of his contract of this job.

The attention of the Court is respectfully called to the testimony of Robert S. Burwell who testified on behalf of the plaintiff (R. 10). He stated he was plaintiff's outside salesman and secured Smith's order for the paints. He said he was sent by Michael to talk with defendant partners about paying for the paints and talked with Mr. Thyson who promised to take care of the bill. The job was completed in the latter part of December, 1933, and Burwell testified his conversation with Thyson was in March, 1934, some three months after the job was completed.

In the Transcript of Record Plaintiff in Error has failed to file a copy of the original Bill of Particulars which was referred to in its original Affidavit of Merit, filed July 11, 1934, as being "attached hereto", and is as follows:

"Paints, linseed oil, turpentine, brushes, scrapers, etc., furnished, etc., on the following dates to J. H. Smith, subcontractor for the repair work at 1704-1706 and 1709 M Street, N. W., and 1150 and 1154 17th Street, N. W."

It was to this defendant partners filed a Motion to Dismiss (R. 4). This was argued before Judge Cayton and while the application of the Statute of Frauds was argued it is denied that Judge Cayton ruled on whether or not the Statute of Frauds applied to the case. His ruling was that the case should be heard on

its merits and gave defendant partners leave to file an Affidavit of Defense. There is nothing in the record to disclose that Judge Cayton made such a ruling as contended by plaintiff. The Motion to Dismiss was filed on August 8, 1934 and argued several days later. Thereafter on August 13, 1934 Plaintiff in Error filed an amended Bill of Particulars (R. 13) and it is respectfully submitted defendant partners and their attorney are not endeavoring to resort to subterfuge as contended by plaintiff's counsel.

In the objection to the allowance of the Writ of Error defendant partners' counsel came to the conclusion that from the evidence the Court held that the promise to pay, if made, was for a past due obligation and as such should have been in writing, and secondly, that at the completion of the contract there were no funds due the defendant, J. H. Smith.

While there was considerable discussion as to whether the Statute of Frauds would apply, the Court below after hearing all the witnesses and having a chance to judge their testimony and demeanor under oath, found, upon the evidence which had been adduced at the trial, for the defendant partners, Bowman & Thyson (R. 14).

2.

ARGUMENT.

There is nothing in the record to show that the attorneys for both sides considered the case presented only a question of law under the Statute of Frauds, nor that Judge Cayton and Judge Aukum so considered it. There was argument as to whether or not, if the promise had been made by Thyson to pay Smith's bill, as

alleged, it would fall within or without the Statute of Frauds. If the promise was within the Statute of Frauds, it would be to answer for the debt of another person and must be in writing. If without the Statute Bowman & Thyson would be liable and no writing would be necessary. However, this is entirely a presumption on plaintiff in error's part and not substantiated by the record, as the trial Court's decision after hearing all the evidence and having had an opportunity to judge the witnesses' testimony and demeanor under oath found as follows (R. 14), as set forth in the Bill of Exceptions:

"This is the substance of all testimony and the Court found for the defendants."

There was no proof of the account being opened in the name of anyone other than John H. Smith and as a matter of fact the account was opened in his name, all charges made to him and all payments on account thereof likewise made by him. It was not until Smith had defaulted and quit his work that anything was charged to Bowman & Thyson. At the time of Smith's default in his contract (R. 13) the defendant partners opened an account in their own names with plaintiff in error and informed its Mr. Michael that Smith had defaulted and it would be necessary for them to complete the work. Whereupon, an account was opened in the name of Bowman & Thyson which eventually amounted to \$126.00 and was paid by them a few days after the work was completed (R. 14).

The record and testimony shows that credit was extended to Smith only. In the original Bill of Particulars it is stated that the paints, linseed oil, etc., were furnished on certain dates to J. H. Smith, subcontract-

tor. The amended Bill of Particulars (R. 3) states that the defendant partners agreed to pay plaintiff in error for supplies furnished the subcontractor Smith, by withholding 15 per cent of the moneys due them by the owners of the building to be used to pay for the paints and painting at the premises set forth therein. There is nothing in the testimony by plaintiff in error's witnesses to show that defendant partners agreed to pay plaintiff by withholding 15 per cent of the money due them by the owner of the building. The testimony on behalf of plaintiff in error is that defendant partners agreed to pay it out of the 15 per cent they were withholding of Smith's contract price in the event he failed to pay.

There is a further discrepancy in their testimony that is very significant and to which the Court's attention is respectfully called. The defendant partners' work as general contractors was completed during the latter part of December, 1933. Yet, on plaintiff in error's behalf, Mr. Burwell testified (R. 10) he was employed as an outside salesman and secured Smith's order for the paints, not Bowman & Thyson's order, but Smith's order. He was the one man who contacted Smith and secured the order. He further testified he was sent by Michael to talk with defendant partners about Smith's bill and talked with Mr. Thyson who promised to take care of the same. The work was completed during the latter part of December, 1933, and his testimony was that he did not talk to Mr. Thyson until March, 1934, some three months after the work of the general contractors was completed.

It is indeed significant that the man who as the outside salesman contacted the defendant Smith and ob-

tained his order, did not hear anything about credit being refused Smith or that Bowman & Thyson agreed to pay his bill out of certain funds, until Michael sent him to talk with defendants some three months after the work was completed.

A further perusal of the testimony (R. 13) shows that Smith defaulted in his contract during the first part of December, 1933, and it became necessary for the defendant partners to take over and complete the work. At this time Smith had been paid \$1,905.00 of the contract price of \$2,237.00. Mr. Thyson went to plaintiff's store and informed it of this fact and that it was necessary for him and Mr. Bowman to complete the work. An account was then opened in the name of Bowman & Thyson which eventually amounted to \$126.00 and was paid by them a few days after the work was completed (R. 14). Had the prior account for materials furnished Smith been in Bowman & Thyson's name, or if plaintiff had looked to them for payment, or considered the alleged promise of Mr. Thyson to stand responsible for Smith's account as an original obligation, then there would have been no need to open an account in the name of Bowman & Thyson and later close it out upon payment of \$126.00.

It is respectfully submitted that with these facts before it, and with an opportunity to observe the falsity or credibility of the witnesses under oath, the trial court was within its province and discretion to find, as it did, for the defendant partners.

Plaintiff in his brief has stated that the Statute of Frauds does not apply "when the promisor has a personal or pecuniary interest in the transaction and promises to pay." It is contended that this is not an accurate and accepted interpretation of the law where

it involves the promise of one to answer for the debt or default of another.

In the case of *Hurst Hardware Co. v. Goodman*, 68 W. Va. 462; 69 S. E. 898, the Court held the mere fact that the promisor has a personal interest in the goods being sold to the third person does not take his promise out of the Statute of Frauds.

It is presumed that plaintiff in error is referring to what is generally known as the "main purpose and object rule." The majority of Courts have held that the application of this rule is governed by the intent of the parties and the surrounding facts and circumstances; and further that the promise sued upon is not within the Statute because the promisor became the debtor and his obligation became primary and not collateral. Some Courts, including the United States Supreme Court, have gone further and held that certain cases are not within the Statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself. However, sight must not be lost of the fact that where the object of the promise is to obtain the release of property of the debtor, or other forbearance or benefit to him, it is within the Statute. The object of the Statute is protection against fraudulent practices commonly endeavored to be upheld by perjury, and it may further be stated as a general principle, that where the leading object sought in making the promise or agreement is to become a guarantor of surety to the promisee for a debt or obligation for which a third person is, and continues to be primarily liable, the agreement, whether made before, after or at the time of the promise of the principal, is within the Statute of Frauds, and not binding unless evidenced by writing.

In the case of *Emerson v. Slater*, 22 How. 28; 16 L. Ed. 360, cited and relied upon by the plaintiff in error, Mr. Justice Clifford speaking for the Court said:

“Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the Statute of Frauds. Other cases arise which also fall within the Statute, where the collateral agreement is subsequent to the execution of the debt, and not the inducement of it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. *But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the Statute.*”

It is respectfully submitted that the turning point under the “main purpose and object rule”, as to whether a promise is within or without the Statute is, “whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own.”

In ascertaining the main purpose and object and to whom credit was actually extended, the intention of the parties must certainly govern. This intention should be ascertained from the words used in making the promise, the situation of the parties and all the circumstances surrounding the transaction. The real nature of the promise does not depend altogether on the form of expression but largely on the situation of the

parties, and the question always is what the parties actually understood by the language, whether they understood it to be a collateral or a direct promise.

In the case of *Davis v. Patrick*, 141 U. S. 479, also cited and relied upon by plaintiff in error, the Court, making reference to the testimony on behalf of Patrick, the plaintiff and promisee, said:

“The testimony of plaintiff as to conversations with defendant is corroborated by other witnesses and *contradicted by none*. It must therefore be accepted as presenting the facts upon which this case must be determined.”

Counsel for Davis placed stress on the form of expression attributed by Patrick to Davis, the promisor, to wit: “I will be personally responsible; I will see you paid;” and contends that the import of such language is that of a collateral promise. The Court went on to say:

“*There is force in this contention, as it implies that someone else was also bound*, but the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise. Patrick declares he understood it to be a direct promise, and acted on the faith of it. *That Davis understood it the same way, is evidenced not only from the circumstances surrounding the parties at the time, but from the fact that in a subsequent interview, when charged to have always promised to pay this debt, he admits that he believes he did.*”

Therefore it is contended that where the language used, together with the surrounding facts, raises a

question whether the parties intended by the promise, if a promise was made, to create an original or a collateral obligation, the intention should be determined by the trial Court as the judge of the facts. This was the line of reasoning followed by the Court in the case of *Froharat v. Duff*, 156 Ia. 144; 135 N. W. 609.

In the case of *Davis v. Patrick*, none of the testimony given on behalf of the promisee was contradicted and Davis admitted that he believed he made the promise. In the instant case Thyson denies all statements attributed to him. It is therefore submitted that in the case at bar there was a conflict in the testimony and the trial Court as the trier of the facts, after hearing all the testimony and being able to judge the surrounding circumstances, found for the Defendant Partners.

Again in the case of *Cincinnati Traction Co. v. Cole, et al.*, 258 Fed. 169, likewise cited and relied on by plaintiff in error the actual question presented was one of fact for the jury to decide and the Court at Page 179 (bottom of page 10 in plaintiff in error's brief) said:

“To say the least, it was open for the jury to find that the promise was to answer for the debt, not out of its own estate, but out of the Heffron Company's funds.”

Plaintiff in error has made the contention that the case at bar should be reversed because no judgment has been taken against the defendant, John H. Smith. It is very significant that he appeared as a witness for plaintiff in error and the record does not show where any attempt was ever made to ask for judgment against him, but only against defendant partners. It is submitted that it is not incumbent upon the defendant

partners to ascertain that a judgment be rendered against another defendant and the trial Court's decision should not be reversed for an act that was the duty of plaintiff in error to perform.

It is plaintiff in error's further contention that even though Smith defaulted in his contract and left the work in an unfinished condition, which cost defendant partners approximately \$200.00 over and above the contract price to complete, the 15 per cent permitted to be retained under the contract still belonged to Smith. This contention is not sustainable.

Wherefore, in conclusion it is submitted that the assignments of error relied on by the plaintiff in error should be denied as contrary to the evidence and the law, and that the decision of the trial Court should be affirmed.

Respectfully submitted,

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